

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs July 22, 2003

STATE OF TENNESSEE v. GREGORY REED TURNER

Direct Appeal from the Criminal Court for Knox County
No. 69617 Richard R. Baumgartner, Judge

No. E2002-02599-CCA-R3-CD
November 5, 2003

The appellant, Gregory Reed Turner, pled guilty in the Knox County Criminal Court to attempted rape. The trial court sentenced the appellant to eight years of incarceration in the Tennessee Department of Correction. The trial court denied the appellant's request for probation and the appellant timely appealed. Upon review of the record and the parties' briefs, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court is Affirmed.

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which GARY R. WADE, P.J., and JOSEPH M. TIPTON, J., joined.

Leslie M. Jeffress, Knoxville, Tennessee, for the appellant, Gregory Reed Turner.

Paul G. Summers, Attorney General and Reporter; Jennifer L. Bledsoe, Assistant Attorney General; Randall E. Nichols, District Attorney General; and G. Scott Green, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Factual Background

Shortly after 8:00 a.m. on October 19, 1999, the appellant, the victim's former boyfriend, entered the victim's apartment without consent. The appellant then proceeded to the bedroom where the victim "lay asleep with her three-year-old child." The appellant approached the victim and "began to kiss and touch her breast and genital area while she continually told him to stop and tried to push him off of her."

The Knox County Grand Jury subsequently indicted the appellant, charging him with three counts of rape and one count of aggravated burglary. On June 24, 2002, the appellant pled guilty to one count of attempted rape. The trial court accepted the appellant's plea of guilty and sentenced the appellant as a Range II multiple offender to eight years in the Tennessee Department of

Correction. Thereafter, the trial court scheduled a sentencing hearing to consider the appellant's request for probation. Following the hearing, the trial court denied the appellant's request for probation and ordered the appellant to serve his eight-year sentence in the penitentiary. On appeal, the appellant challenges the trial court's denial of probation.

II. Analysis

When an appellant challenges the length, range, or manner of service of a sentence, it is the duty of this court to conduct a de novo review with a presumption that the determinations made by the trial court are correct. Tenn. Code Ann. § 40-35-401(d) (1997). However, this presumption is “conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances.” State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). If the record demonstrates that the trial court failed to consider the sentencing principles and the relevant facts and circumstances, review of the sentence will be purely de novo. Id.

In conducting our review, this court must consider (1) the evidence, if any, received at trial and at the sentencing hearing; (2) the presentence report; (3) the principles of sentencing and the arguments of counsel relative to the sentencing alternatives; (4) the nature and characteristics of the offense; (5) any mitigating or enhancement factors; (6) any statements made by the appellant on his own behalf; and (7) the appellant's potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-102, -103 (1997), -210 (Supp. 2002); see also Ashby, 823 S.W.2d at 168. The burden of showing that a sentence was improper is on the appellant. Tenn. Code Ann. § 40-35-401, Sentencing Commission Comments.

Tennessee Code Annotated section 40-35-102(5) provides that only “convicted felons committing the most severe offenses, possessing criminal histories evincing a clear disregard for the laws and morals of society, and evincing failure of past efforts at rehabilitation shall be given first priority regarding sentencing involving incarceration.” A defendant sentenced to eight years or less is eligible for probation. Tenn. Code Ann. § 40-35-303(a) (Supp. 2002). While the trial court must consider probation for eligible defendants, the defendant bears the burden of establishing suitability for probation. Tenn. Code Ann. § 40-35-303(b). Considerations for a sentence of confinement can be found in Tennessee Code Annotated section 40-35-103(1), which provides for confinement when:

- (A) [c]onfinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;
- (B) [c]onfinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or
- (C) [m]easures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant.

Additionally, “the potential or lack of potential for rehabilitation or treatment of the defendant should be considered in determining the sentence alternative or length of a term to be imposed.” Tenn. Code Ann. § 40-35-103(5). A defendant with a long history of criminal conduct and “evincing

failure of past efforts at rehabilitation” is presumed unsuitable for alternative sentencing. Tenn. Code Ann. § 40-35-102(5).

In determining whether to grant the appellant’s request for probation, the trial court considered the presentence report, the sex offender presentence clinical evaluation, and the arguments of counsel. In the presentence report, the forty-three-year-old appellant stated that he occasionally consumed one to two beers after work and that he drank “to excess” approximately once a month. The appellant also reported that he smoked marijuana in the 1970s and the 1980s. Additionally, the presentence report reflected that the appellant had seventeen prior convictions, including one conviction for sexual battery and one conviction for an unnamed “sexual offense.” At least three of the offenses for which the appellant was convicted were committed while the appellant was on probation for prior offenses.

In addition to the presentence report, the trial court considered the sex offender presentence clinical evaluation, which revealed:

[The appellant] admits to sexual contact with his victim, . . . but states the sex was consensual and denies any wrongfulness in his behavior. [The appellant] does not see himself as a criminal or a sex offender and is totally minimizing his culpability in the offense. . . . [The appellant] scores as a moderate to moderate high risk for reoffending. [The appellant] showed no remorse for his behavior and his perceptions are fairly self-focused with minimal empathy for his victim.

After considering the arguments of counsel and reviewing the presentence report and the sex offender presentence clinical evaluation, the trial court denied the appellant’s request for probation, finding,

the record indicates that you have 15 prior criminal convictions, including two prior sexual assault convictions In each of those cases, . . . you have been given probation.

In addition to that, . . . [the sexual offender presentence evaluation] indicates that [you] score as a moderate to a moderate high risk for re-offending and showed no remorse for [your] behavior, and [your] perceptions are fairly self-focused with minimal empathy for [the] victim.

I believe that, based on the criminal history in your case, . . . the fact that this is your third sexual offense conviction, your inability to understand or recognize that the type of conduct you engage in is not acceptable in our society leads me to the conclusion that the appropriate thing for me to do in this case is to deny your application

for probation and order you to serve your sentence in the State Department of Corrections [sic].

On appeal, the appellant challenges the trial court's denial of probation. Initially, the appellant asserts that, although he agreed to be sentenced as a Range II multiple offender, he is "by law" a Range I standard offender. This court has previously rejected a similar argument, holding that "once the appellant agreed to be classified as a range II offender, he became a range II offender for all purposes, including alternative sentencing." State v. Roger Lee Fleenor, No. 03C01-9611-CR-00400, 1997 Tenn Crim. App. LEXIS 1019, at *9 (Knoxville, Oct. 9, 1997); see also State v. Homer L. Evans, No. E2000-00069-CCA-R3-CD, 2001 Tenn Crim. App. LEXIS 196, at *10 (Knoxville, Mar. 20, 2001). As a Range II multiple offender, the appellant is not presumed to be a favorable candidate for alternative sentencing.

Nevertheless, the appellant contends that he is not an offender for whom incarceration is necessary under Tennessee Code Annotated section 40-35-103(1)(A)-(C). Specifically, the appellant asserts that in denying probation, the trial court did not consider this sentencing statute and "offer[ed] only conclusory statements as to the bases for its ruling." We disagree.

At the sentencing hearing, the trial court noted that as part of the plea agreement, the appellant agreed to a sentence of eight years, with the trial court to determine whether to grant probation. The trial court acknowledged that because the appellant's sentence was eight years or less, the appellant was eligible for probation, stating, "That is eight years being the outside limit on a sentence that I can consider for probation." However, the trial court then determined that the appellant was not an appropriate candidate for alternative sentencing. The trial court based its determination upon the appellant's extensive criminal history, including two prior convictions for sexual offenses. See Tenn. Code Ann. § 40-35-103(1)(A). The trial court also denied the appellant's request for probation based upon the appellant's lack of potential for rehabilitation. See Tenn. Code Ann. §§ 40-35-102(5), -103(5). Specifically, the trial court found that the appellant was previously sentenced to probation for a number of offenses, including the sexual offense convictions. Accordingly, we conclude that the trial court properly considered the sentencing principles and appropriately denied alternative sentencing. This issue is without merit.

III. Conclusion

Based upon the foregoing, we affirm the judgment of the trial court.

NORMA McGEE OGLE, JUDGE